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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DONALD N. JACKSON,  
Plaintiff and Respondent,

v.

JOHNNY BROWNING,  
Defendant and Appellant.

A155277

(Alameda County  
Super. Ct. No. RG16830727)

Johnny Browning appeals from three orders denying his motions for postjudgment relief and one order designating him a vexatious litigant. We affirm.

**BACKGROUND**

In September 2016, respondent sued appellant for financial elder abuse and other claims. The complaint alleges appellant contacted respondent after discovering that respondent's home was in tax default, and fraudulently induced respondent to transfer his interest in his home to appellant and make cash payments to him.

At an October 2017 judicial settlement conference, the parties signed a settlement agreement whereby appellant agreed to revoke various documents relating to respondent's real property and both parties agreed to waive all damages claims. Appellant subsequently refused to execute a full release pursuant to the settlement and respondent filed a motion to enforce the settlement agreement. The trial court granted the motion and judgment issued on January 29, 2018.

On January 31, 2018, appellant filed a motion for reconsideration of the order granting respondent's motion to enforce the settlement. The trial court denied the motion. On February 15, appellant filed a motion to amend the judgment. The trial court denied this motion as well. On April 19, appellant—who had previously been represented by counsel but was now proceeding in propria persona—filed a motion to rescind the settlement agreement; on April 23, he filed a motion to vacate the judgment. Both motions were denied. On July 11, appellant filed a motion to set aside the judgment pursuant to Code of Civil Procedure section 473.<sup>1</sup> The motion was denied.

Shortly after appellant's last motion was filed, respondent filed a motion to declare appellant a vexatious litigant. The trial court granted the motion.

## DISCUSSION<sup>2</sup>

Appellant appeals the orders denying his last three postjudgment motions (to rescind the settlement agreement, vacate the judgment, and set aside the judgment under section 473), and the order finding him a vexatious litigant.<sup>3</sup>

### *I. Orders Denying Appellant's Postjudgment Motions*

Appellant's last three postjudgment motions sought relief on numerous overlapping grounds. We conclude appellant has failed to demonstrate any of the grounds provide a basis to vacate or set aside the judgment.

#### *A. Appealability*

As an initial matter, we address respondent's contention that these motions were in fact motions for reconsideration and the orders denying them are therefore

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<sup>1</sup> All undesignated section references are to the Code of Civil Procedure.

<sup>2</sup> Before oral argument, we received notice that respondent had died and his legal representatives and heirs intended to open an estate. “[W]e have not received any request to abate the action, or to effect a substitution, in light of [respondent’s] death. Under these circumstances, we have retained the original title of the case.” (*Konig v. Fair Employment and Housing Com.* (2002) 28 Cal.4th 743, 746, fn. 3.)

<sup>3</sup> We previously dismissed the appeal as to the January 29, 2018 judgment as untimely, and also dismissed the appeal as to a nonfinal minute order.

nonappealable. The same argument was considered, and rejected, in *Huh v. Wang* (2007) 158 Cal.App.4th 1406: “According to respondent, the post-judgment motion ‘should be treated on appeal as a motion for reconsideration or renewal of a previously denied application, within the meaning of . . . § 1008.’ In effect, respondent is asking us to look beyond the motion’s label, both as given by appellant and as treated by the trial court. We decline to do so.” (*Huh*, at p. 1413.) We also reject respondent’s contention to construe the motions contrary to their caption, and find the orders appealable.<sup>4</sup>

*B. Attorney Mistake or Neglect*

Appellant was represented by counsel for most of the proceedings below. After respondent filed his motion to enforce the settlement, appellant’s counsel filed a written opposition but failed to appear at the hearing.<sup>5</sup> Appellant submitted emails in which his attorney states he did not appear because he reviewed the tentative ruling and saw no legal basis to oppose it. Appellant also submitted emails in which the superior court clerk states no tentative ruling was given for this hearing. Appellant refers to a newspaper article indicating that at the time of the hearing his attorney was under investigation for criminal conduct (embezzlement and financial elder abuse, for which he was subsequently convicted). We will assume all of this evidence is properly in the record.

Appellant argues that his attorney did not attend the hearing because he either “did not care about [appellant’s] case” or was “under duress” due to the pending investigation, and that appellant is therefore entitled to relief under section 473. Section 473, subdivision (b), provides, as relevant here: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” “ ‘A party who seeks relief under section 473 on the

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<sup>4</sup> Although the trial court noted the first two motions were “a further untimely attempt to seek reconsideration,” it also considered the motions as captioned.

<sup>5</sup> Appellant substituted new counsel twice before electing to proceed without counsel for his final three postjudgment motions. The attorney filing the opposition was his second, and substituted in shortly after the settlement conference.

basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.’ [Citation.] In determining whether the attorney’s mistake or inadvertence was excusable, ‘the court inquires whether “a reasonably prudent person under the same or similar circumstances might have made the same error.” ’ [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error ‘fairly imputable to the client, i.e., mistakes anyone could have made.’ [Citation.] ‘Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.’ ” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.)<sup>6</sup> “ ‘A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.’ ” (*Id.* at p. 257.)

Appellant fails to establish that the cause of his attorney’s failure to attend the hearing—because he either did not care about appellant’s case or was under duress due to the pending investigation—was excusable. (Cf. *Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 18, 28-29 [attorney’s cognitive impairment resulting from serious illness and heavy medication rendered conduct excusable; claim was one of “genuine medical distress that is so severe it impedes the lawyer’s ability to warn his client or seek assistance from colleagues”].) Accordingly, he fails to show the trial court abused its discretion in denying discretionary relief under section 473, subdivision (b). Appellant cites no other basis to set aside the judgment on this ground.

### C. *Lack of Consideration*

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<sup>6</sup> In contrast, “ ‘[t]he range of attorney conduct for which relief can be granted in the mandatory provision [of section 473, subdivision (b)] is broader than that in the discretionary provision, and includes inexcusable neglect.’ ” (*Gee v. Greyhound Lines, Inc.* (2016) 6 Cal.App.5th 477, 492.) Appellant did not submit his “attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect,” and therefore cannot seek relief under the mandatory provision of the statute. (§ 473, subd. (b).)

Appellant argues he received no consideration under the settlement agreement because “[o]ne of the main reasons” he signed was to make a pending criminal investigation “ ‘go away,’ ” as his then-attorney advised him, but in March 2018 he learned the criminal investigation was still ongoing. Assuming insufficient consideration would be a basis to set aside the judgment, appellant received ample consideration by respondent’s waiver of all claims for damages against appellant. (1 Witkin, Summary of Cal. Law (11th ed. 2018) Contracts, § 215 [“The compromise or release of a . . . disputed claim, which is not wholly void, is good consideration . . . .”].) Accordingly, appellant fails to show an entitlement to relief on this ground.

*D. Alleged Problems with The Settlement Agreement*

All of appellant’s remaining grounds for relief target the settlement agreement and are based on facts known to appellant when his opposition to respondent’s motion to enforce the settlement was filed. These grounds are: the attorney representing him until shortly after the settlement conference was negligent and incompetent in a variety of ways<sup>7</sup>; appellant had sleep apnea at the time of the settlement conference and lacked the mental capacity to enter into the settlement agreement; appellant only signed the settlement agreement because respondent’s attorneys threatened to file a financial elder abuse claim against appellant’s mother; respondent’s attorneys fraudulently made unspecified additions to the handwritten settlement agreement after appellant signed it; respondent’s daughter, who signed the settlement agreement pursuant to her power of attorney for respondent, in fact lacks power of attorney because she committed elder abuse against respondent by turning him against appellant; appellant did not know the property value of respondent’s home had increased at the time the settlement agreement was signed; appellant signed the settlement agreement under financial duress because of his impoverishment and his attorney’s informing him of a similar case that ended in a

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<sup>7</sup> Although appellant claims this attorney had a “diagnosed mental disorder,” the record citation indicates only that the attorney had, well over 10 years earlier, “medical problems” and “emotional difficulties.”

large judgment against the defendant; and the unclean hands of respondent's daughter and attorneys due to their "fraudulent, elder abusive actions in this case."

As noted above, the facts underlying these grounds were known to appellant (or reasonably could have been known to him) when his written opposition to respondent's motion to enforce the settlement was filed. Appellant elected not to include this opposition in the record on appeal. We must therefore presume the opposition presented these grounds to the trial court, which considered and rejected them. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609 [" 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented." ' "].) Appellant did not timely appeal from the subsequent judgment. He provides no authority or analysis as to how, under such circumstances, these grounds can provide a basis for setting aside the judgment. We therefore reject his arguments based on these grounds. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [" ' "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." ' "].)

## II. *Vexatious Litigant Order*

Neither appellant's opening brief nor his reply brief address the trial court's vexatious litigant order. We therefore find appellant has abandoned his appeal of this order. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [appellant's "failure to brief the . . . issue constitutes a waiver or abandonment of the issue on appeal"].)

## DISPOSITION

The orders are affirmed. Respondent is awarded his costs on appeal.

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BURNS, J.

(A155277)